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I. INTRODUCTION

THE aim of this article is not to present an exhaustive analysis or comment on any specific legal doctrine involving proof of guilt, but to view broadly for illustrative purposes a few developments in the law of special importance to the American law enforcement officer, state and federal, in the performance of his duty. Examination of these milestones of the law which mark the course of constitutional limitation on permissible crime investigation may show not only the increase in the law's demands upon its officers, but also the concomitant growth in the need for their instruction in the controlling rules of law and the underlying policies upon which these rules are based.

The developments noted have occurred in the important police action fields of searches and seizures and confessions. Our principal interest, however, is in the confession as an item of evidence and, accordingly, the main part of this discussion is devoted to the latter subject.

Fifty years ago if a conscientious law enforcement officer consulted an up-to-date legal encyclopedia in an attempt to insure that his methods of gathering evidence were in full accord with the law, he would find the following compendious account of the general rules on the matter:

> Evidence is not infrequently obtained by methods that are reprehensible in good morals and offensive to fair dealing, subjecting it to unfavorable inferences, which the party relying upon it must neutralize to entitle it to full credence. And evidence is sometimes obtained under circumstances which meet the unqualified disapprobation of the courts. But the evidence, however unfairly and illegally obtained, is not subject to exclusion, if it be of facts in themselves relevant, except when a party accused of crime has been compelled to do some positive affirmative act inculpating himself, or an admission or confession has been extorted from him by force or drawn from him by appealing to his hopes or fears. A far-reaching miscarriage of justice would result if the public were to be denied the right to use convincing evidence of a defendant's guilt because it had been brought to light through the excessive zeal of an individual, whether an officer or not, whose misconduct must be deemed his own act and not that of the state, and courts, in the administration of the criminal law, are not accustomed to be oversensitive in regard to the sources from which evidence comes, and will avail themselves of all evidence that is competent and pertinent, and not subversive of some constitutional or legal right.[1]

As he put down the unfamiliar tome, this officer of another generation would gather from his reading that few holds were barred in the rough and tumble of criminal investigation; that the courts might disapprove

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1. 8 R.C.L. Criminal Law § 190, at 194 (1929). (Footnotes omitted.)

the method of discovery, but not the proof of guilt discovered; and that the paramount concern of the law was that the evidence obtained be relevant to the case so that those who wilfully refused to obey the rules of community life would not escape the rod of justice.

Conscious of the fact that enforcement of the criminal law is a rugged business, the officer might consider this brief summary of the law to be a practical and realistic view. But nonetheless he would be surprised, for it seemed to indicate not only that the law countenanced official action that was reprehensible in good morals, an attitude that clashed with his own religious convictions, but also that it tolerated police procedures that were illegal, an obvious contradiction that meant nothing less than that the law could be enforced in a lawless way. On second thought, however, the officer would realize that this was not so, that the law did not affirmatively sanction improper and unlawful action by its officers, but what it really provided was that evidence pertinent to the case which happened to be collected in such ways was usable at trial, the person aggrieved being left to whatever other remedies the law might provide for invasion of protected rights.

To some extent his reading of the paragraph might be a source of encouragement to the officer. In the first place, he might believe that if by chance he did happen to breach a technical rule of law in a good-faith effort to discover the perpetrator of crime, his mistake would not fatally injure the prosecution's case. Secondly, since the text indicated that it was the pertinency, *i.e.*, logical relevancy, of the evidence that counted above all, he might conclude that without a formal knowledge of the difficult law of evidence he could still properly discharge his investigative responsibilities. He would, in other words, be able to find evidence in the form of witnesses, documents and physical substances to establish the fact of crime and the identity of the criminal sufficient to prove guilt beyond a reasonable doubt. And he would not be wrong in this conclusion for, after all, the basic requirement governing the admissibility of evidence is that it have rational probative value and this is determined by right reason, not by legal precepts.

With his short review of the law completed, this officer of the past, conscious of his obligation to obey the law and imbued with a natural sense of fair play, could set out to gather the necessary evidence by use of the traditional tools of the policeman's art. He would, for example, employ such investigative means as the interview, surveillance, review of documentary sources of information, the search and seizure of the fruits and instrumentalities of the offense on occasions such as arrest, and the collection of physical traces of criminal activity and the identity of the criminal at the scene of the crime. It is true that many aids would

not be available to him in the analysis of the evidence he collected which the great advances in police science have provided for the law enforcement officer of today; for example, the myriad types of scientific examinations of real evidence afforded by the modern crime laboratory. But even in his time, the science of fingerprint identification furnished its great assistance, and, as noted, he did have at his complete command the most important investigative technique of all—the interview.

The careful and thorough interview of those who may have knowledge, meager or extensive, of the crime or the criminal is the most fruitful source of information of evidentiary value that exists. During the investigative stage of a criminal case it constitutes the main pathway to the discovery of truth. It leads the officer to that evidence, direct and indirect, that provides the probable cause necessary for preliminary legal action and ultimate proof of guilt at trial.

As Mr. Justice Frankfurter has said:

> Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.[2]

In carrying out his lawful duty, therefore, the officer would interview every person, whom his talent and ability could locate, with knowledge pertinent to the case at hand—those on its perimeter, and those at its core.

II. The Progress of The Law

A. *Searches and Seizures*

To the professional law enforcement officer of today the general impression produced by the passage in the legal encyclopedia perused by his predecessor woud appear strange, so great and many have been the changes in the law that have occurred in the interim. In fact, a great departure from the view of the law that the admissibility of relevant evidence is not affected by the illegality of the means through which it was obtained was already underway when the encyclopedia consulted was in the process of publication.

This change took place in 1914, in the crucial area of search and seizure, when the Supreme Court of the United States, influenced by reasons of constitutional magnitude, handed down its decision in *Weeks v. United States*[3] in a historic move already heralded by the Court's opinion

2. Culombe v. Connecticut, 367 U.S. 568, 571 (1961).
3. 232 U.S. 383 (1914).

in *Boyd v. United States*[4] a generation before. *Weeks* held that pertinent documents obtained by a federal officer through means of an unlawful search and seizure could be excluded from evidence at a trial in federal court as a consequence of the fourth amendment to the federal constitution.[5]

In that case the defendant was convicted for use of the mails in a lottery enterprise. In the course of the investigation, his private papers, books and other property were seized at his house during his absence and without his authority by a federal officer who had no warrant for his arrest or for search of the premises. Asserting his rights under the fourth and fifth amendments to the Constitution, the defendant before trial applied to the court for a return of his property. The court ordered the return of that property which was not pertinent to the charge against the defendant, but denied the petition as to that which was relevant. The retained letters and correspondence were put in evidence at the trial and he was convicted.

In reversing the judgment of conviction, the Supreme Court declared:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[6]

Fourteen years after its formulation the powerful effect of the *Weeks* doctrine was described by Chief Justice Taft as follows:

> The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment. Theretofore many had supposed that under the ordinary common law rules, if the tendered evidence was pertinent, the method of obtaining it was unimportant.[7]

Since the fourth amendment, as such, is a limitation on federal action, the *Weeks* decision laid down its exclusionary rule for the federal courts alone. Its influence, however, was great and the principle was accepted by many of the individual states as a rule of procedure in the enforcement of their own criminal law. The eventual carry-over of the *Weeks*

4. 116 U.S. 616 (1886).
5. 232 U.S. at 398.
6. Id. at 393.
7. Olmstead v. United States, 277 U.S. 438, 462-63 (1928).

doctrine to the states in *Mapp v. Ohio*[8] by means of the due process clause of the fourteenth amendment has made the exclusionary rule the law of the land and constitutes one of the most important developments in the history of American law enforcement.

As a result of this historic development, the prohibition of the fourth amendment against unreasonable searches and seizures is enforceable against the states through the fourteenth amendment not only by the same sanction of exclusion but also by the application of the same constitutional standards. The reasonableness of a state search is determined from the facts and circumstances of the case in the light of the fundamental criteria laid down by the fourth amendment and in the opinions of the Supreme Court applying that amendment. The states, however, are not precluded from developing workable rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement, provided they do not violate the constitutional proscription of unreasonable searches and seizures, and the command that evidence so seized is inadmissible against those persons who have standing to complain.[9]

It is imperative that the law enforcement officer understand the policies and purpose which lie behind the exclusionary rule laid down in *Weeks* and *Mapp* by which evidence obtained through an unreasonable search and seizure is barred from federal and state proceedings. If he does, his zeal to gather evidence that will prove the guilt of those responsible for crime will be tempered by that prudence which often spells the difference between good and bad law enforcement. The purpose of the rule is not to guard against untrustworthy evidence that may injure the cause of truth. Indeed, the rule affects evidence whose relevancy and reliability is unquestioned.[10] The policies underlying the rule are to effectively enforce the fourth amendment's protection of the right to privacy, and to close the doors of the courts to any use of evidence unconstitutionally obtained. If the strict standards set by the law for constitutional searches and seizures are not satisfied, the evidence thereby obtained is rendered inadmissible. The rule is calculated to compel respect for the constitutional guaranty by deterring official action in violation of it through removal of the incentive to disregard it.

Obviously a monumental change in orthodox legal doctrine such as that enunciated in the *Weeks* case did not come about without great judicial thought and was not received without great difference in judicial opinion. The classic discussion of the pros and cons necessarily involved

8. 367 U.S. 643 (1961).

9. See Ker v. California, 374 U.S. 23 (1963).

10. Linkletter v. Walker, 381 U.S. 618, 639 (1965).

is found in the lucid and forceful opinion delivered in the case of *People v. Defore*[11] in 1926 by Mr. Justice Cardozo who was then a judge of the New York court of appeals.

In that case, a search carried out by trespassing law enforcement officers led to the seizure of a blackjack for whose possession the defendant was tried. After noting that "means unlawful in their inception do not become lawful by relation when suspicion ripens into discovery,"[12] Judge Cardozo reviewed the sanctions then existing under New York law against such official misconduct, including resistance to the trespassing officers, suit for damages, prosecution for oppression, and removal or other discipline of the officers at the hands of their superiors. On consideration, however, of the question whether the further sanction of rejection of the evidence of criminality because of official misconduct should be added to these, he concluded that it should not.[13]

Judge Cardozo, remarking that there are dangers in any choice between them, brilliantly laid out the two great ends at stake: on the one hand—"the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office."[14] He pointed out that greater protection of the individual's right to privacy would be secured if the government were required to ignore what it had learned through invasion of this right; but the sanction of exclusion would have a far-reaching effect upon society because "the pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious."[15]

The great judge in reaching his decision that the prevailing New York statute against unreasonable searches and seizures did not bar the use of illegally obtained evidence at trial summed up his view of the effect of *Weeks* in his well known aphorism: "There has been no blinking the consequences. The criminal is to go free because the constable has blundered."[16]

B. *Confessions*

Despite the general view of the common law that relevant evidence however unfairly and illegally obtained is not subject to exclusion, the courts, as the officer noted in the encyclopedia, refused to receive in evidence extrajudicial confessions of guilt obtained from a defendant under the influence of improper inducement. Special treatment was af-

11. 242 N.Y. 13, 150 N.E. 585 (1926).
12. Id at 19, 150 N.E. at 586.
13. Id. at 21-22, 150 N.E. at 588.
14. Id. at 24-25, 150 N.E. at 589.
15. Id. at 23, 150 N.E. at 588.
16. Id. at 21, 150 N.E. at 587.

forded this type of evidence which by its nature is possessed of particularly great probative strength. The flat rule laid down almost two hundred years ago was that a pretrial confession to be valid evidence must not have been extorted from a defendant by force or drawn from him by appealing to his hopes or fears;[17] or, as the courts stated the rule affirmatively, briefly, and indefinitely, the confession to be admissible had to be "voluntary."

Historically, at the common law, involuntary confessions were rejected because they constituted unreliable evidence. It was reasoned that the pressure of improper inducement might influence a suspect or prisoner to confess falsely to a crime he did not commit in order to gain relief from the pressure. Since some confessions obtained by such inducement might be false, they were all deemed untrustworthy and were ruled to be inadmissible in evidence because they could not be safely used to support a conviction of guilt.

Today, however, the main reason involuntary confessions are excluded from evidence in all American courts is because their use breaches the constitutional privilege against self-incrimination. The standard of voluntariness grounded in the policies of this fundamental guaranty was set as the controlling constitutional rule in federal prosecutions at the turn of the century and has in recent years evolved as the rule applicable in state criminal cases. The fact that the voluntariness of a confession now turns on the constitutional privilege guaranteeing a prisoner the absolute right to remain silent and the fact that the Supreme Court has delineated detailed and mandatory procedural safeguards in the form of warnings and waiver to insure that the protection of the privilege is fully effective while he is subjected to in-custody questioning have added new responsibilities of great importance to the American law enforcement officer. Furthermore, the policies involved in this standard of admissibility have affected other rules of confession law bottomed on the pre-existing reason for exclusion. Consequently, the development of the current doctrine is of especial interest.

The traditional rationale underlying the rule excluding involuntary confessions, *i.e.*, they are inadmissible because they constitute untrustworthy evidence and not on account of the great privilege or due to any impropriety in the manner of their procurement, was expounded by Chief Justice Lemuel Shaw of Massachusetts as follows:

> The ground on which confessions made by a party accused, under promises of favor, or threats of injury, are excluded as incompetent, is, not because any wrong is done to the accused, in using them, but because he may be induced, by the pressure of

17. See The King v. Warickshall, 1 Leach Cr.C. 263, 168 Eng. Rep. 234 (1783), where this rule of admissibility for a confession was first clearly enunciated.

hope or fear, to admit facts unfavorable to him, without regard to their truth, in order to obtain the promised relief, or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted. . . . The general rule of law seems sufficiently plain and clear, but the great variety of facts and circumstances, attending particular cases, renders the application difficult, and each case must depend much on its own circumstances.[18]

Although the application of the rule based on this rationale was difficult and each case had to depend greatly on its own circumstances, the courts singled out two specific situations, noted by Chief Justice Shaw in his opinion,[19] where experience had demonstrated that the stresses on an innocent person might especially lead to a false confession; namely, when he was subjected to the pressure of fear or hope engendered by threats of harm or promises of benefit.

An English court highlighted these factors as traditional elements of the rule in the following succinct paragraph:

It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because, under such circumstances, the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon.[20]

Obviously under this concept if a threat of harm vitiated a confession, a fortiori the use of actual corporal violence would render a confession obtained as a result likewise inadmissible.

Almost from the beginning, however, the veiled concept of the privilege against self-incrimination appeared alongside the historical rationale. The early recognition of this concept, resting not on reasons of evidential reliability but on humanitarian and fair-play grounds, is seen in the following passage from Hawkins' Pleas of the Crown:

The human mind under the pressure of calamity is easily seduced; and is liable, in the alarm of danger, to acknowledge, indiscriminately, a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction . . . .[21]

In regard to this principle, *i.e.*, that men are not to be exploited for the information necessary to condemn them before the law, the Supreme Court has declared:

18. Commonwealth v. Morey, 67 Mass. 461, 462-63 (1854).
19. Ibid.
20. Regina v. Scott, 1 D. & B. 47, 58, 169 Eng. Rep. 909, 914 (1856).
21. 2 Hawk. P.C., 604 n.2 (6th ed. 1787).

This principle, branded into the consciousness of our civilization by the memory of the secret inquisitions, sometimes practiced with torture, which were borrowed briefly from the continent during the era of the Star Chamber, was well known to those who established the American governments. Its essence is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.[22]

1. The *Bram* Doctrine

At the turn of the century, the Supreme Court of the United States expressly held in the famous case of *Bram v. United States*[23] that the constitutional privilege against self-incrimination was the controlling principle governing the admissibilty of extrajudicial confessions in federal courts. Prior to that time the Court had decided confession cases, which came like *Bram* solely from the lower federal courts, pursuant to the traditional rationale.[24]

Bram involved the midnight triple-axe murder in the year 1896 of a ship's master, his wife and the second mate aboard an American vessel on the high seas. When the bodies of the three victims were discovered, the suspicion of the crew centered on a seaman called Brown whom they placed in irons under the supervision of Bram, the first officer of the ship. Later Brown told his shipmates that while he was at the schooner's wheel on the night of the crime he had seen Bram kill the captain; and thereupon the crew shackled Bram as well. When the vessel put in at Halifax, Nova Scotia, the two suspects were held in police custody to await the action of the American authorities.

While at this foreign port, Bram was brought from jail by a police officer to city hall for interview by a Halifax detective. While he was alone in a room with the detective, Bram was stripped of his clothing for purposes of search, and a conversation took place during which Bram made certain statements, set out below, tending to implicate himself in the crime.[25]

At Bram's subsequent trial for murder in federal court at Boston, Massachusetts, the detective was called as a witness for the prosecution. He testified that when the defendant came into the room, he said to him: "Bram, we are trying to unravel this horrible mystery. Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder." To this Bram replied: "He could not have seen me. Where was he?" The detective said: "He states

22. Culombe v. Connecticut, 367 U.S. 568, 581-82 (1961). (Footnotes omitted.)
23. 168 U.S. 532 (1897).
24. See, e.g., Hopt v. People, 110 U.S. 574 (1884).
25. 168 U.S. at 534-37.

he was at the wheel." Bram answered: "Well, he could not see me from there."[26]

The detective further testified that he then said: "Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But, some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." Bram then remarked: "Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it."[27]

The detective declared that during their conversation no threats were made in any way to Bram and no inducements were held out to him. Bram's statements were received in evidence against him as a confession and he was convicted.[28] The Supreme Court, however, concluding that Bram's statements were not voluntary,[29] reversed the conviction and ordered a new trial.[30]

In the course of its opinion, the Court enunciated the following principle controlling the issue of the voluntariness of a confession in federal trials:

> In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' . . . A brief consideration of the reasons which gave rise to the adoption of the Fifth Amendment, of the wrongs which it was intended to prevent and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the Amendment was but a crystallization of the doctrine as to confessions, well settled when the Amendment was adopted . . . .[31]

Acknowledging the difficulty experienced in attempting to reconcile the authorities due to the varying factual situations in the decided cases, the Court declared that no doubt or obscurity could arise as to the rule itself because it is found in the text of the Constitution.[32] After pointing out that much of the confusion had arisen from a misconception of the subject to which the proof of voluntariness must address itself, the Court said:

> The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were

26. Id. at 539.
27. Ibid.
28. Id. at 534.
29. Id. at 565.
30. Id. at 569.
31. Id. at 542-43.
32. Id. at 549.

voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent.[33]

In reaching its conclusion that the making of the statements by Bram was not voluntary, the Court noted that although the facts involved, when isolated from each other, might be insufficient to warrant the inference that a compelling influence had been exerted, taken as a whole, they gave room to the strongest inference that the statements were not made by one who in law could be considered a free agent.[34] The Court based its conclusion that the statements could not be the result of a purely voluntary mental action on the following considerations: At the time Bram made the statements, he was under arrest in a foreign country in the custody of the police, and had been taken from jail as a suspect to the private office of a detective, where alone and stripped of his clothing, he was interrogated by the detective who exercised complete authority and control over him.

His statements were made in reply to the detective's assertion that Brown had charged him with the crime. The effect of this reported accusation by his co-suspect was to produce upon Bram's mind the fear that if he remained silent it would be considered an admission of guilt, and the hope that if he denied it, suspicion would be removed from him. Although his answer was in the form of a denial, it was offered as a confession because of the implication of guilt which it was conceived the words of the denial might be considered to mean. Furthermore, the Court noted that the detective's remark to Bram that if he had an accomplice he should say so and not have the blame of the crime on his own shoulders conveyed an express intimation of benefit if he spoke. This remark might well have been understood to hold out an encouragement that by so doing Bram might at least obtain a mitigation of punishment for the crime. Thus, it rendered the confession involuntary within the rule laid down by the authorities.[35]

In its appraisal of the circumstances in which Bram's statements were made and the evidential use to which they were put, the Court declared: "A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of."[36]

The *Bram* decision was not received without criticism or question. For example, Dean Wigmore, the champion of the traditional trustworthiness

33. Ibid.
34. Id. at 563-64.
35. Id. at 561-64.
36. Id. at 564.

rationale for the exclusion of involuntary confessions, wrote in regard to the statements of the Supreme Court on the fifth amendment's privilege being a crystallization of the doctrine on confessions: "Of this it must suffice to say that no assertions could be more unfounded. The history of the two rules . . . shows that there never was any historical connection or association between the constitutional clause and the confession-doctrine."[37]

Wigmore mentioned several reasons for his view that the blending of the rule excluding untrustworthy confessions and the privilege against self-incrimination was incorrect, among them these: the two principles derived from separate lines of precedents; if the privilege, which was fully established by the year 1680, was sufficient, there would have been no need for the creation of a distinct confession-rule a century later; and, generally, that the privilege concerns statements made in court, while the confession-rule concerns statements made out of court.[38]

In maintaining that confessions were not rejected because of any connection with the privilege against self-incrimination, he noted further that: "The sum and substance of the difference is that the confession-rule aims to exclude self-incriminating statements which are *false,* while the privilege-rule gives the option of excluding those which are *true.*"[39]

In his discussion of the privilege against self-incrimination vis-à-vis the traditional confession rationale, Dean McCormick, after pointing out that the cluster of doctrines relating to confessions bears the aspect of a regulation which safeguards the discovery of truth by keeping away from the jury a kind of evidence because of its special untrustworthiness, goes on to say:

> Nevertheless, there is an insistent recurrence in the decisions on confessions of language which savors of privilege. . . . It well may be that the adherence of the courts to this form of statement of the confession-rule in terms of "voluntariness" is prompted not only by a liking for its convenient brevity, but also by a recognition that there is an interest here to be protected closely akin to the interest of a witness or of an accused person which is protected by the privilege against compulsory self-crimination.
>
> It may be conceded that in time of origin the confession-rule and the self-crimination rule were widely separated, and certainly Chief Justice White's language in Bram v. United States to the effect that the fifth amendment guaranteeing the privilege "was but a crystallizaton of the doctrine as to confessions" is an historical blunder. Nevertheless, the kinship of the two rules is too apparent for denial.[40]

Wigmore in this same vein conceded that the confession rule and the

37. 3 Wigmore, Evidence § 823, at 250 n.5 (3d ed. 1940). See also id. § 821, at 240-41 n.2.
38. See 8 Wigmore, Evidence § 2266, at 401 (McNaughton rev. ed. 1961).
39. 3 Wigmore, op. cit. supra note 37, § 823, at 250.
40. McCormick, Evidence § 75, at 155 (1954). (Footnotes omitted.)

privilege are not sometimes kept plainly apart and that judicial expressions blending the two rules into one principle might be expected. He then notes:

> This is natural enough, for not only have they the common feature of an acknowledgement of guilty facts, but also, by the test frequently employed . . . the test of voluntariness for confessions becomes almost identical with the idea of compulsion as forbidden by the privilege.[41]

In a footnote to the Supreme Court's opinion in *Culombe v. Connecticut*,[42] it is said that while Wigmore attributes to the confession-rule the sole purpose of assuring the reliability of evidence, and there can be no doubt that the fear of false confessions played a large part in the adoption of the rule, it is equally clear that there soon mingled with this original and at first exclusive impetus another independent and sufficient, although historically diverse, reason. This latter reason is the conception that the use of extorted confessions set at naught the underlying tenet of the accusatorial system of trial—that men might not be compelled to speak what would convict them. In this way, the conceptions underlying the rule excluding coerced confessions and the privilege against self-incrimination have become, to some extent, assimilated.

From the time it was handed down, the *Bram* case has been cited with approval by the Supreme Court,[43] but it was not resorted to with any great frequency, and it was not received with universal approbation.[44] One Supreme Court decision that is of interest because it indicates the breadth of the grounds for the exclusion of a confession under the *Bram* doctrine is the 1924 case of *Ziang Sung Wan v. United States*,[45] where the Supreme Court reversed a judgment of conviction of murder. Although it appeared that no threats or promises had been made to the defendant, he confessed after he had been subjected for seven days to almost continuous examination. On one occasion, while he was suffering from spastic colitis, his examination continued throughout the night.

Mr. Justice Brandeis, citing *Bram*, delivered the opinion of the Court. He said:

> The Court of Appeals appears to have held the prisoner's statements admissible on the ground that a confession made by one competent to act is to be deemed voluntary,

41. 8 Wigmore, op. cit. supra note 38, § 2266, at 400-01.

42. 367 U.S. 568, 583 n.25 (1961).

43. E.g., Shotwell Mfg. Co. v. United States, 371 U.S. 341, 347 (1963); Smith v. United States, 348 U.S. 147, 150 (1954); Ziang Sung Wan v. United States, 266 U.S. 1, 15 (1924); Hardy v. United States, 186 U.S. 224, 229 (1902). See also Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

44. E.g., Stein v. New York, 346 U.S. 156, 190-91 n.35 (1953), overruled, Jackson v. Denno, 378 U.S. 368, 391 (1964); United States v. Carignan, 342 U.S. 36, 41 (1951).

45. 266 U.S. 1 (1924).

as matter of law, if it was not induced by a promise or a threat; and that here there was evidence sufficient to justify a finding of fact that these statements were not so induced. In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. *A confession is voluntary in law if, and only if, it was, in fact, voluntarily made.* A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise.[46]

The reason for the relative infrequency with which *Bram* was invoked apparently lies in the fact that due to the broad supervisory authority the Supreme Court has over the procedure and practice of the lower federal courts, its reviewing power over convictions in federal courts is not confined to ascertainment of constitutional validity. In the exercise of its power, the Court can declare a confession inadmissible in a federal criminal trial whenever this is deemed necessary in the interests of justice. Therefore, it has been unnecessary in most of the pertinent cases to invoke constitutional provisions in support of the rule that involuntary confessions are inadmissible in federal court.

Furthermore, the Court has had little occasion in the past quarter century to reach constitutional issues in dealing with federal interrogations because of its inauguration in 1943 of the exclusionary practice known as the McNabb Rule, which does not arise from constitutional sources but is based on its supervisory authority over the administration of federal criminal justice.[47] This rule of evidence for criminal trials in federal courts holds that a confession of guilt, though not the result of torture, physical or psychological, is inadmissible in evidence where made by a prisoner under arrest and detained in violation of Rule 5(a) of the Federal Rules of Criminal Procedure requiring commitment "without unnecessary delay." The doctrine has not been applied by the Court to state confession cases under due process.

It should be noted also that after it commenced its consideration of the state coerced confession cases under the due process clause of the fourteenth amendment, the Court by and large left federal judges to apply the same standards it began to derive in the latter line of decisions.[48]

2. The Due Process Test

The recent application to the States of the fifth amendment's privilege against self-incrimination through the due process clause of the four-

46. Id. at 14-15. (Emphasis added.) (Footnote omitted.)
47. McNabb v. United States, 318 U.S. 332, 340 (1943).
48. Miranda v. Arizona, 384 U.S. 436, 506-07 (1966) (Harlan, J., dissenting).

teenth amendment,[49] and the formulation by the Supreme Court of new standards governing in-custody interrogation based on the need to protect the exercise of this fundamental constitutional right from the danger occasioned by such questioning,[50] constitute the culmination of developments in confession law which began a generation ago.

In 1936 the Supreme Court, in the exercise of its authority to ascertain whether the basic safeguards of the fourteenth amendment are violated by state action, held for the first time that the due process clause prohibited the States from using a defendant's coerced confession against him at trial. Since that time a due-process test of voluntariness has evolved out of the decisions of the Court involving confessions in state criminal trials. The case which led off this line of decisions was *Brown v. Mississippi*.[51]

Prior to the *Brown* decision, the individual States had developed through case law and statute, against the backdrop of the common-law rule and rationale, their own tests of voluntariness governing the admissibility of confessions. These tests varied in strictness from jurisdiction to jurisdiction. In addition to the traditional rationale for exclusion, the concept of the privilege against self-incrimination had its influence in state confession cases. After the *Bram* decision was handed down, there was continuing conflict among the state authorities as to the fundamental reason for exclusion. Some held that the privilege applied; others that it did not. Still others resorted to both the privilege and the historical reason in the same case. Inconsistency existed. For example, the high court of one state declared in 1926:

> Involuntary confessions are rejected not because of the illegal or deceitful methods employed in securing them but because of their unreliability. . . . When the authorities are analyzed there is practically no disagreement among them. . . . This principle of testimonial untrustworthiness being the foundation of exclusion, it follows that the exclusion is not rested upon the privilege against self-crimination.[52]

The same court, however, four years later in 1929, in holding a confession inadmissible which was made by the defendant at a time when he was adjudicated to have been insane, declared: "A confession, to be admissible, must be voluntary. A voluntary confession necessarily involves a waiver of the constitutional right against self-incrimination."[53] In *Brown v. Mississippi*,[54] the three defendants were convicted of murder

49. Malloy v. Hogan, 378 U.S. 1, 3 (1964).
50. Miranda v. Arizona, 384 U.S. 436 (1966).
51. 297 U.S. 278 (1936).
52. People v. Fox, 319 Ill. 606, 609-11, 150 N.E. 347, 348-49 (1925).
53. People v. Shroyer, 336 Ill. 324, 325-26, 168 N.E. 336 (1929).
54. 297 U.S. 278 (1936).

and sentenced to be hanged. Aside from their confessions which were shown to have been extorted by state officers by brutality and violence, there was no evidence sufficient to warrant the submission of the case to the jury. The victim in the case was found by his neighbors on March 30, 1934, dying from a murderous assault. That night a deputy sheriff, accompanied by others, accused the first defendant of the crime. On his protestation of innocence, he was hanged twice and whipped; but finally released. A day or two later, the deputy, and another, placed the defendant under arrest and again severely whipped him until he confessed to a statement of guilt dictated by the deputy. On April 1, 1934, the other two defendants were arrested and jailed and the same deputy, in the company of other men, including an officer, whipped them unmercifully until they also confessed. The defendants were told that if they changed their story at any time they would receive the same or equally effective treatment. The next day, April 2, 1934, the defendants repeated their confessions to the sheriff of the county in the presence of others.

At the trial the prosecution offered the sheriff as a witness to testify to the confessions made to him by the defendants; and at the suggestion of the defense a preliminary examination as to the competency of the confessions was conducted in the absence of the jury. During the *voir dire* the sheriff stated that he had used no force and made no threats or promises to the defendants to induce their confessions; and the defense offered no evidence in contradiction. Cross-examination of the sheriff by the defense, however, disclosed that although he had no personal knowledge of the torture, he had heard rumors that prior to their confessing to him the defendants had been whipped and had previously confessed, and that one of the defendants, who was limping when the sheriff saw him, had said that he could not sit down because he had been "strapped pretty hard." The trial judge ruled that the confessions made to the sheriff were voluntary and admissible; and the defense objection to his testimony was overruled.

Thereafter, the defendants took the stand and testified that they had made the confessions to the sheriff which were offered in evidence, but that prior to that time they had been seriously whipped and mistreated; that they had confessed because of this treatment; that they had been warned to tell the same story; and that they made the confessions to the sheriff on account of fear of further violence. The defendants stated that the sheriff had treated them kindly, promised to protect them from harm, told them that they did not have to talk, and that if they did, they should tell only the truth. Two of them stated that just before they took the stand, they told the sheriff that their confessions to him were true.

Later in the trial, examination of rebuttal witnesses for the state also disclosed that the defendants had been whipped before they confessed. The defense, however, failed to make a motion to exclude the confessions after the disclosure of this evidence tending to show the confessions were made under the influence of fear induced by threats and violence. Furthermore, the trial judge did not act to exclude it on his own. At that time it was the state rule that if a confession was admitted after a preliminary examination, no error was committed by a failure to exclude it, in the absence of a request to do so, even though during the later progress of the trial it appeared that the confession was not competent evidence. The case went to the jury with instructions, upon the request of defendant's counsel, that if the jury had reasonable doubt as to the confessions having resulted from coercion, and that they were not true, they were not to be considered as evidence.

Following their convictions, the defendants appealed unsuccessfully to the supreme court of the state.[55] Later, they filed in the same court a "suggestion of error" challenging the trial proceedings.[56] Among the questions raised before the court was whether the failure of the trial judge to exclude the confessions after the introduction of evidence tending to show they were coerced, although not requested to do so, violated the privilege against self-incrimination and due process clauses of the state constitution and also the due process clause of the fourteenth amendment.

The high state court, noting in the course of exposition that nothing in its opinion was intended even remotely to sanction the method by which the confessions were obtained,[57] first considered the claim that the privilege against self-incrimination provision of the state constitution had been violated. The court stated that the privilege was not violated because assuming the admission in evidence, over the objection of the defendant, of a confession coerced by violence is forbidden by the privilege, the record disclosed no objection had been made on that ground. The court said that the rule against self-incrimination is not an absolute immunity, but is simply a privilege, though sacred and important, of which the accused may avail himself or not at his pleasure, and it may be, and is, waived unless specifically claimed.[58]

As to the defendants' claims that due process was violated by the admission of the confessions, the state court, citing the decisions of the Supreme Court of the United States in *Twining v. New Jersey*[59] and

55. Brown v. State, 173 Miss. 542, 158 So. 339 (1935).

56. Brown v. State, 173 Miss. 542, 161 So. 465 (1935).

57. Id. at 572, 161 So. at 470.

58. Id. at 566-69, 161 So. at 467-68.

59. 211 U.S. 78 (1908). It is noted in this famous Twining case, a state trial judge had instructed the jury that it might draw an adverse inference from the failure of a defendant

Snyder v. Massachusetts,[60] declared that "immunity from self-crimination is not essential to due process of law."[61]

The state court further declared that if the defendants meant to say that the failure of the trial judge to exclude the confessions after the introduction of evidence tending to show their incompetency, although not requested to do so, deprived them of due process, there was no merit to their claim. The court stated that this procedure was in accord with that applicable to all civil and criminal trials, recognized in all common-law jurisdictions, and did not result in arbitrarily depriving the defendants of any constitutional or common-law right. This is all, the court said, that the due process clauses of the two constitutions require. Moreover, the court declared, if the trial judge had erroneously overruled the motion to exclude the confessions, its ruling would have been mere error reversible on appeal, but would not have constituted denial of due process.

After the Mississippi supreme court had thus decided the federal question against the defendants on these two foregoing grounds, the Supreme Court of the United States reviewed the case on certiorari and held that due process had been denied, that convictions of murder which rest solely upon confessions shown to have been extorted by state officers by torture are void under the due process clause of the fourteenth amendment.[62]

In an opinion, delivered by Chief Justice Hughes, the Court initially reviewed the facts evidencing that the confessions were procured by coercion and then considered the two grounds on which the state had based its decision that there was no denial of due process. As to the first contention to the effect that the privilege against self-incrimination was not safeguarded against state action by the fourteenth amendment, the Court noted that the state had stressed the statement in *Twining* that "exemption from compulsory self-incrimination in the courts of the States is

to testify. Following conviction, the case was brought before the Supreme Court of the United States for review. It was asserted that the trial judge's instruction constituted a denial of a defendant's right, secured by the Constitution of the United States, not to be compelled to testify against himself. The Supreme Court, however, held that the state law permitted such an inference, that the fifth amendment did not apply to state action, and that neither the privileges and immunities clause nor the due process clause of the fourteenth amendment included the privilege against self-incrimination. Id. at 99. Twining, however, was overruled in Malloy v. Hogan, 378 U.S. 1 (1964), and the Supreme Court thereafter held in Griffin v. California, 380 U.S. 609 (1965), that adverse comment by a state judge or prosecutor upon a defendant's failure to take the stand constitutes a denial of the privilege against self-incrimination.

60. 291 U.S. 97 (1934).

61. 173 Miss. at 567, 161 So. at 468.

62. Brown v. Mississippi, 297 U.S. 278 (1936).

not secured by any part of the federal constitution,"[63] and also the statement in *Snyder* that "the privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state."[64] The Court said, however, that these two statements were not relevant to the *Brown* case. It declared:

> [T]he question of the right of the State to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. *Compulsion by torture to extort a confession is a different matter.*[65]

The Court said that a state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, but this freedom is limited by the requirement of due process of law. Because it may abolish trial by jury, for example, it does not follow that it may substitute trial by ordeal. Stating that a trial is a mere pretense when state authorities have contrived a conviction resting solely upon confessions obtained by violence, it then declared:

> The due process clause requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." . . . It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.[66]

In disposing of the state's second contention, the Supreme Court said that it rested upon the failure of defense counsel, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved. The Court said that this contention was a misconception of the nature of the defendant's complaint which was not of the commission of a mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. The Court declared that it was not concerned with a mere question of state practice, or whether counsel for the defendants were competent or mistakenly assumed that their first objections were sufficient.[67] Here, where the duty of a trial court to supply corrective process when due process is denied had been recognized by earlier state decision, the trial judge had not done so. Although he was fully advised

63. Id. at 285, quoting Twining v. New Jersey, 211 U.S. 78, 114 (1908).
64. 297 U.S. at 285, quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
65. 297 U.S. at 285. (Emphasis added.)
66. Id. at 286.
67. Id. at 286-87.

by undisputed evidence of the way in which the confessions had been procured and knew that there was no other evidence upon which conviction and sentence could be based, he nevertheless proceeded to permit conviction and pronounce sentence. The Court declared that the conviction and sentence were therefore void for want of the essential elements of due process.[68]

In the years after the *Brown* decision was handed down, more and more state coerced confession cases came before the Supreme Court. Since the federal question presented was whether the confessions involved were made under such circumstances of coercion that their use as evidence at trial constituted a violation of the due process requirement that state criminal proceedings shall be fair and consistent with fundamental principles of liberty and justice, no precise formula to determine this issue was devisable. The facts and circumstances of each individual case had to be carefully weighed in a necessarily flexible approach to the solution of the problem.

In its decisions in these cases, too well known to require citation, the Court made it clear that under the due process clause the coercion which will vitiate a confession need not be physical as it was in *Brown v. Mississippi*, but can be mental as well. It recognized that "the blood of the accused is not the only hallmark of an unconstitutional inquisition."[69] As time went on, therefore, the attention of the Court was directed from the gross but relatively rare abuse of physical brutality, or blatant threats thereof, to interrogation techniques of a less obvious but nevertheless potentially coercive nature such as protracted questioning. The Court characterized the modern practice of interrogation as psychologically rather than physically oriented and over the years its test of voluntariness under due process became increasingly meticulous.

As to the applicable test, the Court said in 1961:

> In light of our past opinions and in light of the wide divergence of views which men may reasonably maintain concerning the propriety of various police investigative procedures not involving the employment of obvious brutality, this much seems certain: It is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions. No single litmus-paper test for constitutionally impermissible interrogation has been evolved . . . ."[70]

The general test of admissibility applied was this: "Is the confession the product of an essentially free and unconstrained choice by its

68. Ibid.
69. Blackburn v. Alabama, 361 U.S. 199, 206 (1960).
70. Culombe v. Connecticut, 367 U.S. 568, 601 (1961).

maker?"[71] If it is, if the defendant willed to confess, it may be used against him. If it is not, if his will was overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.[72]

In reaching a decision as to the voluntariness of a confession, the Court weighed the circumstances of pressure against the power of resistance of the person confessing, for "what would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."[73] The Court has said: "The notion of 'voluntariness' is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes."[74]

In directing its attention to the question of psychological duress as an influence vitiating the voluntariness of a confession, the Court's range of inquiry was broad. It insisted that the judgment in each instance as to coercion be based upon consideration of the "totality of the circumstances"[75] surrounding the confession, including those related to the personal makeup of the defendant, the propriety of the conduct of the interrogating law enforcement officers, and the environment in which the questioning and the confession took place.

Among the specific factors the Court has taken into account in the "totality of circumstances" surrounding the confession to determine if it was freely and voluntarily made or was the result of overbearing by the authorities have been the defendant's age, character, health, mental capacity, education, emotional state, past record as to criminal activity and experience with the police, and knowledgeableness; the legality of the defendant's arrest, delay in his arraignment, and the conditions of his incarceration; the duration and repeated nature of the questioning to which the defendant was subjected, the number of his questioners and whether they worked in relays; whether subterfuge was used; whether the defendant was held incommunicado from his friends, relatives and counsel; and whether the defendant was advised of his rights.

In these cases no single one of the foregoing factors or any fixed combination of them guaranteed exclusion of a confession as being involuntary. Circumstances such as the fact that police officers in their treatment of a prisoner violated state statutes, failed to warn him of his rights, denied him the opportunity to consult with counsel, or subjected him to incommunicado questioning for long periods did not in and

71. Id. at 602.

72. Ibid.

73. Stein v. New York, 346 U.S. 156, 185 (1953), overruled, Jackson v. Denno, 378 U.S. 368, 391 (1964).

74. Culombe v. Connecticut, 367 U.S. 568, 604-05 (1961).

75. Fikes v. Alabama, 352 U.S. 191, 197 (1957).

of themselves require reversal. The question was whether, as a result of the attendant influences, the will of the particular defendant was overborne at the time he confessed to such a degree that the confession could not be considered the product of a free and rational choice.

In applying the due process voluntariness test the Court was concerned with several underlying considerations affecting the concept of fundamental fairness—the need to prevent the use of confessions that were probably unreliable, the need to protect against improper conduct on the part of law enforcement officers in their procurement of confessions, and the need to ensure that the defendant's capacity to choose to confess or not in the exercise of his free will was not impaired. It was understood that since confessions to be admissible need not be spontaneous, the fair process of interrogation which the public interest required would involve some sort of pressure upon the defendant. A concern for evidential reliability based on the traditional confession rule was found in the earlier cases, but in the later decisions the attention of the Court centered most consistently on the need to provide that any confession made be the product of the defendant's free and rational choice.[76]

Mr. Justice Harlan has set out the varying values involved in the test of admissibility as follows:

> While the voluntariness rubric was repeated in many instances . . . the Court never pinned it down to a single meaning but on the contrary infused it with a number of different values. To travel quickly over the main themes, there was an initial emphasis on reliability . . . supplemented by concern over the legality and fairness of the police practices . . . in an 'accusatorial' system of law enforcement . . . and eventually by close attention to the individual's state of mind and capacity for effective choice . . . . The outcome was a continuing re-evaluation on the facts of each case of *how much* pressure on the suspect was permissible.[77]

One decision of especial importance in this series of state confession cases considered by the Supreme Court under the due process voluntariness test is that of *Lisenba v. California*[78] where the Court later said the marked shift to the federal standard of the privilege against self-incrimination began.[79]

In this case the defendant and a confederate were indicted for the murder of the defendant's wife. The confederate pleaded guilty and turned state's evidence. The defendant was subjected to two periods of protracted questioning. Incriminating statements which the defendant made to officers during the second period were offered in evidence against him at his trial. The defendant objected to their introduction on the

76. Miranda v. Arizona, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting).

77. Id. at 507. (Footnote omitted.)

78. 314 U.S. 219 (1941).

79. Malloy v. Hogan, 378 U.S. 1, 7 (1964).

ground that they were involuntary; but the trial judge, after a preliminary hearing, ruled that they were voluntary under state law and admitted them. The conviction of murder that followed was affirmed by the high court of the state and a writ of habeas corpus denied. On certiorari the important question before the Supreme Court was whether the use of the incriminating statements at his trial rendered the defendant's conviction a deprivation of life under due process of law, i.e., a failure to observe that fundamental fairness essential to the very concept of justice. The Court held that it did not.[80]

The evidence as to the making of the incriminating statements by the defendant was conflicting but, briefly, went as follows: The defendant, a man of almost no formal education but intelligent and experienced in business, was arrested on a charge of incest on April 19, 1936, and was arraigned and committed on April 21st. During the period between arrest and arraignment he was repeatedly and persistently questioned at intervals concerning his wife's death and his face was slapped by an officer allegedly because of an offensive remark he made about his wife, a remark which the defendant denied he had said. This period of questioning did not produce a confession.

From April 21st to May 2nd while he was in jail, the defendant was not interviewed, threatened or mistreated and was allowed to consult with counsel. On May 2nd, however, the defendant was confronted by his confederate and questioned on the basis of the latter's confession. Thereafter he was taken from jail pursuant to a court order and interrogated that day and into the small hours of May 3rd. Without refusing to answer questions put to him, the defendant at first made no incriminating statements, but later, after being confronted with his confederate again, he did. No physical violence, threats or inducements attended the making of his confessions, but a request he made to have a lawyer summoned on that occasion was not honored.

The Court said that the failure of the arresting officers to arraign the defendant promptly, his detention from April 19th to April 21st, and any assault committed upon him were violations of state statutes and criminal offenses. The Court also said there was no authority for the court order taking him from jail on the day he made his incriminating statements, and the denial of an opportunity to consult counsel which he requested was a misdemeanor.[81]

The Court noted, however, that the gravamen of the defendant's complaint under due process was the unfairness of the use of his confessions at trial and what occurred in their procurement was relevant to this

80. 314 U.S. at 239-41.

81. Id. at 235.

constitutional question only as it bore on that issue. The Court stated that illegal acts, as such, committed in the course of obtaining a confession do not answer this constitutional question. Furthermore, it said, that the fact confessions are adjudged admissible under state law does not answer the question. While the aim of the state confession rule is to exclude false evidence, the aim of the requirement of due process is to prevent fundamental unfairness in the use of evidence, whether it is true or false; and the criteria for the decision of the latter question may differ from that appertaining to the state rule as to the admissibility of a confession.[82]

The Court stated that the fundamental fairness required by due process is violated "when a coerced confession is used as a means of obtaining a verdict of guilt,"[83] but that it could not hold on the facts of this case as it found them and in the light of the findings of the state courts that the illegal conduct in which the officers indulged had coerced the confessions. The Court declared that it disapproved the violations of law involved in the defendant's treatment and cautioned that officers must realize that if they indulge in such practices they may, in the end, defeat rather than further the ends of justice. Despite this, however, the initial prolonged questioning before arraignment, in the absence of counsel; and the second protracted interrogation of the defendant eleven days later on May 2nd and May 3rd, either in and of itself or in the light of the defendant's earlier experience, did not result in an involuntary confession whose introduction at trial was the infringement of due process of which the defendant had complained.

Summarizing the factual basis for its holding and enunciating the test that commenced the shift in these due proces cases to the federal standard of the privilege against self-incrimination, the Court declared:

> The petitioner has said that the interrogation would never have drawn an admission from him had his confederate not made a statement; he admits that no threats, promises, or acts of physical violence were offered him during this questioning or for eleven days preceding it. Counsel had been afforded full opportunity to see him and had advised him. He exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at his trial, which negatives the view that he had so lost his freedom of action that the statements made were not his but were the result of the deprivation of *his free choice to admit, to deny, or to refuse to answer.*[84]

In the 1961 decision of *Rogers v. Richmond*,[85] the Supreme Court held that under the due process clause of the fourteenth amendment a state legal standard for governing the admissibility of a confession which

82. Id. at 235-38.
83. Id. at 236-37.
84. Id. at 240-41. (Emphasis added.)
85. 365 U.S. 534 (1961).

took into account the circumstances of its probable truth or falsity was not permissible.

The defendant, Rogers, was arrested in Connecticut on January 9, 1954, for attempted robbery and other crimes at a hotel. A ballistics test showed that the gun he had in his possession at the time of his arrest had been used in a fatal shooting that took place during a liquor store robbery the previous November. On January 30, 1954, while in custody on the charges that prompted his arrest, he was transported from jail without a court order to the office of the state's attorney for questioning on the liquor store murder. After being interrogated for six hours without success, a police official pretended in Rogers' hearing to telephone an order to other personnel to stand by to bring in his wife for questioning. Rogers continued his silence for another hour, but when the official indicated he was about to have Mrs. Rogers taken into custody, he announced his willingness to confess and admitted the killing. The following morning the coroner ordered Rogers to be held incommunicado in jail, and when a lawyer associated with his counsel called to see him, he was turned away on the authority of the coroner's order. Later the coroner, who had been advised of his confession, put Rogers on oath to tell the truth, warned him of his right not to say anything, and advised him that he might obtain counsel. Rogers again confessed.

At a hearing during the trial, outside the presence of the jury, Rogers contended that the confessions were the product of coercion, claiming that shortly after the commencement of his interrogation he had asked to see a lawyer but was not permitted to do so, and that the officer's pretense to bring in his wife, who suffered from arthritis, was a threat to do so unless he confessed, and he confessed in order to spare her. The prosecution produced evidence in refutation of these contentions. The trial judge concluded that the confessions were voluntary and admitted them in evidence for the consideration of the jury.[86] Rogers was convicted of murder; and the supreme court of errors of Connecticut affirmed the conviction.[87]

The trial judge reached his conclusion that the confessions were voluntary and admissible because the pretense of bringing in Rogers' wife for questioning had no tendency to produce a confession not in accord with the truth. In his charge to the jury he stated that no confession is admissible in evidence unless made voluntarily and not under the influence of promises or threats; that the fact that a confession was procured by artifice does not exclude it if it was not calculated to procure an untrue statement; that the object of evidence is to get at the truth and that the rules which surround the use of a confession are designed and put into

86. Id. at 541.

87. 143 Conn. 167, 120 A.2d 409 (1956).

operation because of the desire expressed in the law that the confession, if used, be probably a true confession.[88]

This same view—that the probable reliability of a confession is a circumstance of weight in determining its voluntariness—entered the opinion of the supreme court of errors in sustaining the trial judge's conclusion. The high court of the state noted that if it conceded that Rogers' claims of illegal removal from jail and incommunicado detention were true and that this police conduct was unlawful, standing alone they did not render the confessions inadmissible; that the question is whether such conduct induced the defendant to confess falsely, and unless it did, it cannot be said that its illegality vitiated his confessions. The court stated that proper authorization should have been secured before Rogers was removed from jail, but there was nothing about his illegal removal to demonstrate that he was thereby forced to make an untrue statement; and that the same could be said concerning the refusal to admit counsel to see him. As to the feigned telephone call that Rogers' wife be brought in for questioning, the high state court said that, here again, the question for the trial judge to decide was whether this conduct induced Rogers to make an involuntary and hence untrue statement.[89]

On review of the case on certiorari, the Supreme Court declared that the traditional "trustworthiness" test of admissibility of a confession is not a permissible standard under the due process clause of the fourteenth amendment, and that the employment by the state courts of a standard infected by the inclusion of references to probable reliability resulted in a constitutionally invalid conviction. The Court said:

> Our decisions under that Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. . . . To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement.[90]

88. 365 U.S. at 542.

89. 143 Conn. at 173-74, 120 A.2d at 412.

90. 365 U.S. at 540-41.

It is noted that the rule of the Rogers case that the truth or falsity of a confession is irrelevant to the question of its admissibility is equally applicable in a federal prosecution.[91]

The denouement of the story on the controlling reason for the exclusion of involuntary confessions in American courts is found in the opinion of the Supreme Court in the 1964 case of *Malloy v. Hogan*.[92] In that decision, the Court held that the fourteenth amendment prohibits state infringement of the privilege against self-incrimination just as the fifth amendment prevents the federal government from denying the privilege. It held also that in applying the privilege, the same standards determine whether an accused's silence is justified regardless of whether it is a federal or state proceeding.

Malloy was not a coerced confession case but involved a defendant who, as a witness in a state inquiry into gambling in Connecticut, invoked the privilege against self-incrimination in refusing to answer questions related to a previous arrest for that type of offense. The Connecticut superior court adjudged him in contempt and committed him to prison until he was willing to answer. The Connecticut supreme court of errors in affirming a denial of the defendant's application for a writ of habeas corpus held that the fifth amendment's privilege against self-incrimination was not available to a witness in a state proceeding; that the fourteenth amendment did not extend the privilege to him; and that he had not properly invoked the privilege available under the Connecticut constitution.[93]

In holding that the fourteenth amendment did prohibit state infringement of the privilege against self-incrimination, the Supreme Court overruled its 1908 decision in *Twining v. New Jersey*[94] where it had declared that the privilege was not safeguarded against state action by the fourteenth amendment. In arriving at its contrary holding in *Malloy*, the Court explained that its decisions since *Twining* had departed from the view there expressed. In its consideration of the state coerced confession cases, the Court stated, it had felt impelled, in the light of *Twining*, to say initially in *Brown v. Mississippi*[95] that its conclusion in the latter case did not involve the privilege against self-incrimination.[96] However, the Court said, the distinction drawn in *Brown* that "compulsion by torture to extort a confession is a different matter" was soon abandoned, and today the admissibility of a confession in a state criminal prosecution

91. See Shotwell Mfg. Co. v. United States, 371 U.S. 341, 350 n.10 (1963).
92. 378 U.S. 1(1964).
93. 150 Conn. 220, 187 A.2d 744 (1963).
94. 211 U.S. 78 (1908).
95. 297 U.S. 278 (1936).
96. 378 U.S. at 6.

is tested by the same standard applied in Federal prosecutions since 1897 when the Court held in *Bram v. United States*[97] that the question of the voluntary character of a confession is controlled by the fifth amendment's privilege against self-incrimination.

The Court declared that the marked shift to the federal standard in state cases began with the *Lisenba* case where it spoke of the defendant's "free choice to admit, to deny, or to refuse to answer."[98] This shift reflects recognition, the Court said, "that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the fifth amendment privilege is its essential mainstay," and that the state and federal governments are constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth.[99]

The Court said that the fourteenth amendment secures against state invasion the same privilege that the fifth amendment guarantees against federal infringement; i.e., " 'the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will.' "[100]

The Court also pointed out that its holding in *Malloy* was fortified by its decision in *Mapp v. Ohio*.[101] The Court stated that *Mapp*, in returning to the view expressed in the *Boyd* decision[102] of 1886 that the privilege against self-incrimination is one of the "principles of a free government," had necessarily repudiated the Twining concept of the privilege as a mere rule of evidence.[103]

In holding that the same standards must determine whether an accused's silence in either a federal or state proceeding is justified, the Court noted in *Malloy* that in the state coerced confession cases involving the policies of the privilege against self-incrimination, there has been no suggestion that a confession might be considered coerced if used in a federal but not a state tribunal.[104]

Thus, the standard of voluntariness which eventually evolved in the state coerced confession cases under the due process clause of the fourteenth amendment is the same general standard applied in federal prosecutions; *i.e.*, one grounded in the policies of the privilege against self-incrimination.

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97. Id. at 6-7.
98. 314 U.S. at 241.
99. 378 U.S. at 7-8.
100. Id. at 8.
101. 367 U.S. 643 (1961).
102. Boyd v. United States, 116 U.S. 616 (1886).
103. 378 U.S. at 9, quoting from Boyd v. United States, 116 U.S. at 632.
104. Id. at 10-11.

3. *Escobedo* and *Miranda*

The substratal force of *Malloy*, harnessed to that of *Gideon v. Wainwright*[105] where the Supreme Court had held in 1963 that the due process clause of the fourteenth amendment made the sixth amendment's right to counsel obligatory upon the states, was felt almost immediately in the decision of the Court in the celebrated case of *Escobedo v. Illinois*.[106] In *Escobedo* the officers failed to advise the defendant of his absolute constitutional right to remain silent, denied his requests to consult with his retained lawyer, and prevented the latter, who was at the police station where the questioning leading to the confession took place, from consulting with the defendant.

Although up to *Escobedo*, the Court in its decisions in the state coerced confession cases had treated the failure of officers to warn defendants of their rights and to grant them access to outside assistance as circumstances tending to prove the involuntariness of the resulting confession, it had declined to condemn an entire process of in-custody interrogation for a confession solely because of such conduct.[107]

The Court, however, ruled as follows in Escobedo:

> We hold . . . that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.[108]

Although *Escobedo* held narrowly that the statements elicited from the defendant by the officers under the foregoing circumstances were inadmissible because they were obtained in violation of the right to counsel, the implications of the decision were much broader, especially as to the mandatory nature of the so-called "warnings" to a prisoner prior to questioning. The ruling became the subject of earnest judicial interpretation and spirited legal debate in the months that followed and varying conclusions were arrived at in assessing its implications.[109]

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105. 372 U.S. 335 (1963).

106. 378 U.S. 478 (1964).

107. Cicenia v. Lagay, 357 U.S., 504 (1958); Crooker v. California, 357 U.S. 433 (1958). These cases were overruled by Miranda v. Arizona, 384 U.S. 436, 479 (1966).

108. 378 U.S. at 490-91.

109. See, e.g., Miranda v. Arizona, 384 U.S. 436, 440-41 & nn.1-3 (1966).

In the momentous decision of *Miranda v. Arizona*,[110] two years later, the Supreme Court reaffirmed *Escobedo* and discussed in great depth the relationship of the fifth amendment privilege against self-incrimination to law enforcement interrogation.

The question before the Court was whether the privilege is applicable during the period of in-custody interrogation; i.e., when questioning is initiated by law enforcement officers after a person has been taken into custody or is otherwise deprived of his freedom of action in any significant way.[111] The Court ruled that the privilege is fully applicable at that time. Characterizing the privilege as the mainstay of our adversary system of criminal justice and a constitutional guaranty founded on a complex of values which in sum can be fulfilled only when a person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will,"[112] the Court declared that it was "satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by officers during in-custody questioning";[113] that in such circumstances an individual cannot be otherwise than under compulsion to speak.

The Court stated that this question, in fact, could have been taken as settled in the federal courts by virtue of the holding in *Bram* which set down the fifth amendment standard for compulsion. As to state cases, the Court said that it had squarely held in *Malloy v. Hogan*[114] that the privilege was applicable to the states and that the substantive standards underlying it applied with full force to state court proceedings, and that it had applied the existing fifth amendment standards in that case. Noting that the reasoning in *Malloy* made it clear that the substantive and procedural safeguards surrounding the admissibility of confessions in state cases had become exceedingly exacting and reflected all the policies embedded in the privilege, the Court said that the "voluntariness doctrine in the state cases . . . encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice."[115]

After declaring that the fifth amendment privilege is available outside criminal court proceedings and protects persons from being compelled to incriminate themselves in all settings in which their freedom of action is

110. Id. at 436.

111. Id. at 444 n.4 where the Court states that this is what it meant in Escobedo where it spoke of an investigation which had focused on an accused.

112. Id. at 460, citing Malloy v. Hogan, 378 U.S. 1, 8 (1964).

113. Id. at 461.

114. 378 U.S. 1 (1964).

115. 384 U.S. at 464-65. (Footnote omitted.)

curtailed, the Court concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[116]

The Court said that when a person is taken into custody and is subjected to questioning, in order to combat the coercive pressures generated which put the privilege against self-incrimination in jeopardy, he must be adequately and effectively apprised of his rights and their exercise must be fully honored throughout any interrogation conducted.[117]

The Court then laid out in detailed fashion the procedural safeguards that must be employed to guarantee full effectuation of the privilege in the process of in-custody questioning. These safeguards consist in the so-called "warnings" on the rights possessed by a person in custody which the interrogating officer must make known to him, and the express waiver of these rights which the prisoner must give to the officer prior to any questioning. Specifically, the officer must inform the prisoner that he has the right to remain silent; he must caution him that any statement he does make may be used as evidence against him in a court of law; and he must advise him that he has a right to consult with a lawyer, to have the lawyer present with him during the questioning, and, if he is indigent, to have a lawyer appointed to represent him prior to any interrogation.[118]

The Court explained that the warning as to the right to silence is an "absolute prerequisite in overcoming the inherent pressures of the interrogating atmosphere." It makes those persons unaware of the privilege cognizant of it; it is the initial requirement of an intelligent decision as to its exercise; and it shows the prisoner "that his interrogators are prepared to recognize his privilege should he choose to exercise it."[119] The caution that anything said can and will be used against him makes the prisoner aware of the consequences of foregoing the privilege. The warning regarding the right to counsel and its scope is indispensable to the protection of the fifth amendment privilege because the presence of counsel dispels the compelling atmosphere of the interrogation and makes the process of interrogation conform to the dictates of the privilege.

The Court said that after these warnings are effectively given, the prisoner may expressly waive effectuation of his rights, provided the waiver is made voluntarily, knowingly and intelligently. If an interroga-

116. Id. at 467.
117. Ibid.
118. Id. at 468-75 (passim).
119. Id. at 468.

tion continues, however, without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant validly waived his privilege against self-incrimination and his right to counsel.[120] Furthermore, the Court said, whatever the testimony of the authorities as to waiver of rights by the defendant, "the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so"; and is inconsistent with any notion of a voluntary relinquishment of the privilege.[121]

The Court ruled that the requirement of warnings and waiver of rights delineated in *Miranda* is a fundamental with respect to the fifth amendment privilege and not simply a preliminary ritual to existing methods of interrogation. It is an absolute prerequisite to in-custody interrogation. "[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]."[122]

The Court in reaffirming *Escobedo* stated that it was an explication of the basic constitutional privilege against self-incrimination and right to counsel which were put in jeopardy through official overbearing.[123] In discussing the *Escobedo* holding against the general backdrop of the fifth amendment privilege, the Court said that in its opinion it had repeatedly stressed the fact that the officers had not advised the defendant of his constitutional privilege to remain silent at the outset of the interrogation, a point which was not an isolated factor but an essential ingredient of its decision. The denial of the defendant's request for the assistance of counsel undermined his ability to exercise the privilege. The Court said that the defendant's abdication of the privilege was not made knowingly or competently because of the failure to apprise him of his rights. The compelling atmosphere of the in-custody interrogation, not an independent decision on his part, caused him to speak.[124]

Thus, the prime purpose of the rulings in *Miranda* and *Escobedo* is to guarantee full effectuation of the privilege against self-incrimination by assuring that a prisoner's right "to choose between silence and speech

120. Id. at 475.
121. Id. at 476.
122. Id. at 479. (Footnote omitted.)
123. Id. at 442.
124. Id. at 465.

remains unfettered throughout the interrogation process"[125] and that if he responds to interrogation, he does so with an intelligent understanding of his right to remain silent and of the consequences which may flow from relinquishing it. They thus secure observance of the traditional principle that the law will not suffer a prisoner " 'to be made the deluded instrument of his own conviction.' "[126]

To the argument that society's need for interrogation outweighs the privilege, the Court has replied that an individual's right not to be compelled to be a witness against himself is prescribed by the Constitution and cannot be abridged. If he desires to exercise his privilege, he has a right to do so. This is not for the authorities to decide.

The Court has held that its decisions in *Escobedo* and in *Miranda* are to be applied prospectively only.[127] While defendants tried after the dates of decision in these cases will benefit fully from the new standards announced therein governing in-custody interrogation, past defendants may still avail themselves of the voluntariness test for confessions evolved in the state coerced confession cases under due process.

4. The Fruits Doctrine

Six years after the historic *Weeks* decision was handed down where the Supreme Court, under a broad view of the fourth amendment, excluded from evidence documents unlawfully obtained by a federal officer, the question of the use of knowledge gained by means of such unlawful action came before the Court in *Silverthorne Lumber Co. v. United States*.[128]

In this case Silverthorne and his father were arrested at their homes for violation of a federal statute. While detained in custody, federal officers, without authority, went to their company's office where they seized various documents. They then took the papers to the United States Attorney's Office and made copies and photographs of those that were material. When the defendants moved to recover the unlawfully seized papers, the federal district court ordered the return of the originals but impounded the photographs and copies. Thereafter a new indictment was framed based on the knowledge obtained from the papers. Subpoenas were served on the defendants to produce the originals for the use of the grand jury, but they refused to do so. The court, although it found that the documents had been seized in violation of constitutional rights, or-

125. Id. at 469.
126. Culumbe v. Connecticut, 367 U.S. 568, 581 (1961).
127. Johnson v. New Jersey, 384 U.S. 719 (1966).
128. 251 U.S. 385 (1920).

dered the subpoenas to be complied with. On the failure to comply, the court fined the company for contempt, and ordered Silverthorne to be imprisoned until he purged himself of a similar contempt. A writ of error was brought to review the court's judgment.

The Supreme Court held that the order to produce was vitiated by the illegality of the original seizure. Speaking for the Court in reversing the judgment, Mr. Justice Holmes noted that the government was repudiating and condemning the illegal seizure in form, but at the same time was trying to use the information obtained by its illegal act. It was proposing that it could study the illegally seized papers, copy them, return them and then use the knowledge gained to order the owners to produce them in a more regular manner.[129]

He stated that it was not the law to hold that *Weeks* established that the production of the papers before the grand jury directly was unwarranted, but that this only meant two stages were required instead of one. Declaring that it would reduce the fourth amendment to "a form of words" to maintain that the protection of the Constitution covers the physical possession but not the advantages the Government can gain over the object of its pursuit by its forbidden act, he said:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.[130]

Mr. Justice Frankfurter in 1939 characterized as the "fruit of the poisonous tree" evidence which is not the direct product of illegal official conduct but is derived therefrom.[131] He pointed out, however, that while knowledge gained by the government's own wrong cannot be used simply because it is used derivatively, and sophisticated argument may prove a causal connection between the information obtained through illicit means and the government's proof, nevertheless, as a matter of common sense "such connection may have become so attenuated as to dissipate the taint."[132]

In the past the question of the admissibility of logically relevant evidence obtained by law enforcement officers as the indirect result of illegal methods has arisen most frequently in the general milieu of search and

129. Id. at 391.
130. Id. at 392.
131. Nardone v. United States, 308 U.S. 338, 341 (1939).
132. Ibid.

seizure where such unlawful action led to physical evidence of the defendant's complicity. Recent developments in the law, however, have made the "fruit of the poisonous tree" doctrine of growing importance in the confession area. In the confession cases, two situations are to be distinguished: first, the inadmissibility of a confession because it is itself the "poisonous fruit" of an unlawful arrest or search; and secondly, the exclusion of evidence because it is the "poisonous fruit" of an involuntary confession.

As to the first situation, the Supreme Court held in a recent federal case[133] that where one of the two defendants involved made incriminating statements in his bedroom to trespassing officers at the time of his unlawful arrest, the statements were the fruits of the officers' unlawful actions, and were inadmissible in evidence.[134] The Court declared that although the federal exclusionary rule had traditionally barred physical materials obtained during or as a direct result of an unlawful invasion, verbal evidence, deriving immediately from an entry of living quarters unlawful under the fourth amendment and from an unauthorized arrest made without probable cause, is no less the "fruit" of official illegality, and as in the case of the more common tangible fruits of unwarranted intrusion is likewise inadmissible.[135]

The Court found that the arrest of the second defendant in the case was also unlawful because of an absence of probable cause, but ruled that the confession by him which eventually followed was nevertheless admissible.[136] The Court explained that after the unlawful arrest of this particular defendant, but following his lawful arraignment and release on his own recognizance, he had voluntarily gone to the authorities several days later and made his incriminating statement. As a consequence the Court concluded that his confession was not the "fruit" of unlawful arrest because the connection between the latter and the confession had " 'become so attenuated as to dissipate the taint.' "[137]

In further regard to this first situation, the Court held in a recent state case that it was permissible for a defendant to claim that his admissions and confession had been induced by his being confronted with illegally seized evidence.[138] In this case, the defendant, who had painted swastikas

133. Wong Sun v. United States, 371 U.S. 471 (1963).

134. Id. at 485-86.

135. Id. at 485. The Court also held that narcotics, to which the officers had been immediately led by the defendant's inadmissable bedroom declarations, could not be used against him because they were " 'come at by the exploitation of that illegality.' " Id. at 487-88.

136. Id. at 491.

137. Ibid., citing Nardone v. United States, 308 U.S. 338, 341 (1939).

138. Fahy v. Connecticut, 375 U.S. 85 (1963).

on a synagogue, was convicted of willfully injuring a public building. By means of an illegal search, the paint and brush were seized by officers and thereafter, while under arrest, the defendant made admissions and eventually a full confession.

Although the record in the case when it reached the Supreme Court of the United States did not show whether the defendant knew the police had seized the paint and brush before he made his admissions, the prosecution said that he had "probably" been told of the search by that time. Furthermore, the Court concluded that the defendant unquestionably knew the police had obtained the paint and brush by the time he made his full confession.

At his trial, which took place prior to *Mapp v. Ohio*, the defendant was not allowed to pursue the illegal search and seizure inquiry and the paint and brush were admitted into evidence along with his admissions and confession. Thus, he was unable to argue at that time that the illegally seized evidence induced his admissions and confession, a claim which he told the Court he would make if he were allowed to challenge the search and seizure as illegal at a new trial. The Court, citing the principle set out in *Silverthorne* that "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all," declared that such a line of inquiry was permissible and that the defendant should have a chance to show that his statements were induced by being confronted with the illegally seized evidence.[139]

As to the second situation, i.e., that concerning evidence obtained as the result of an involuntary confession, the rule at the common law was that such evidence was not excludable by reason of the fact that it was obtained by means of an involuntary confession. This view is illustrated by the opinion of the English court in *Rex v. Warickshall*.[140] In this leading case, a man named Thomas Littlepage was indicted at the Old Bailey for grand larceny and a woman named Jane Warickshall was also charged as an accessory after the fact; viz., with having received the property involved in the larceny knowing it to have been stolen. She made a full confession of guilt and in consequence of it the property was found concealed in her bed. The court, however, refused to admit her confession because it found that it had been obtained by promises of favor. Her counsel thereupon argued that since the fact of finding the stolen property in her custody had been obtained through the means of an inadmissible confession, the proof of that fact ought also to be rejected because

139. Id. at 91. See also text accompanying note 5 supra.

140. 1 Leach Cr. Cas. 263, 168 Eng. Rep. 234 (1783).

otherwise Jane Warickshall would be made "the deluded instrument of her own conviction."[141]

To this contention, the court, after stressing the common-law rationale that involuntary confessions "forced from the mind by the flattery of hope, or by the torture of fear" are inadmissible as evidence of guilt because of their evidential untrustworthiness,[142] declared:

> This principle respecting confessions has no application whatever as to the admission or rejection of *facts*, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source; for a fact, if it exist at all, must exist invariably in the same manner, whether the confession from which it is derived be *in other respects* true or false. . . . The rules of evidence which respect the admission of facts, and those which prevail with respect to the rejection of parol declarations or confessions, are distinct and independent of each other. . . . Although confessions improperly obtained cannot be received in evidence, yet . . . any *acts* done afterwards might be given in evidence, notwithstanding they were done in consequence of such confession.[143]

The common-law rule admitting facts discovered by virtue of a defendant's involuntary confession was not limited to real evidence, such as the loot in a larceny case, but was also extended to testimonial evidence of witnesses who were located as a result of the information disclosed. For example, in *Lockhart's Case*[144] the defendant was indicted for stealing a number of diamonds and pearls. He made a full confession; but only after improper inducements, rendering his confession inadmissible in evidence, had been made to him in the form of promises of favor. By reason of the involuntary confession, however, it was discovered that some of the stolen jewels had been disposed of to one Grant. Counsel for the prosecution called Grant as a witness to prove that he had received the property from the defendant, but the defense contended that Grant was not a competent witness because his discovery had resulted from the illegal confession. The English court held, however, that the law was clearly settled that although a confession improperly obtained cannot be given in evidence, yet it can never go to the rejection of the evidence of other witnesses "which are got at in consequence of such a confession."[145]

The type of cases in which the common-law rule on the admissibility of incriminating evidence disclosed by an involuntary confession has

141. Ibid.

142. Id. at 263-64, 168 Eng. Rep. at 235.

143. Id. at 264-65, 168 Eng. Rep. at 235. (Emphasis added.)

144. Rex v. Lockhart, 1 Leach Cr. Cas. 386, 168 Eng. Rep. 295 (1785).

145. Id. at 387, 168 Eng. Rep. at 295.

come most frequently into play are those involving the crimes of larceny, robbery, burglary and the receiving of stolen goods where the inadmissible confession leads to the discovery of the stolen property in the place where the defendant said that it would be found. The rule is not confined, however, to theft-type offenses. It has been followed in such cases as murder where the confession leads to the uncovering of the body of the victim, the place of the killing, or the disclosure of the fatal weapon. Furthermore, it has been applied in sundry other offenses where the fruits or instrumentalities of the crime, or leads to other evidence proving the case are located by this means.[146]

As shown by the decision in *Warickshall's Case*, the doctrine holding that relevant and material facts discovered in consequence of information obtained from an involuntary confession are nonetheless admissible in evidence is bottomed on the traditional reason underlying the common-law rule of exclusion; i.e., involuntary confessions are inadmisible because they might well be false and thus constitute evidence so untrustworthy it is not entitled to credit. These after-discovered facts were admitted because they tended to prove the trustworthiness of the confession. But does the doctrine cut two ways? In other words, when it is admitted that involuntary confessions are to be excluded because of the danger that they might be false, does it follow that such confessions are admissible when as a result of them facts are discovered which show that they must be true and therefore clearly reliable evidence?

Wigmore says in this regard:

> [W]here, in consequence of a confession otherwise inadmissible, *search is made and facts are discovered which confirm it* in material points, the possible influence which through caution had been attributed to the improper inducement is seen to have been nil, and the confession may be accepted without hesitation.[147]

Wigmore refers to this theory as "confirmation by subsequent facts." He states that it has been in vogue ever since there has been any doctrine about excluding confessions, and that it has always been accepted, at least in the abstract.[148] In Wharton it is said that:

> When an inadmissible confession leads to the discovery of inculpatory facts, all courts admit evidence of such facts, but differ in the extent to which they will admit the confession itself under such circumstances. The authorities are divided into three classes: (1) those courts that admit no part of the confession, but only the inculpatory facts which have been discovered; (2) those courts which admit the entire confession to accompany the facts, on the theory that if any part of the confession can

146. See 3 Wigmore, Evidence §§ 858-59 (3d ed. 1940).
147. Id. § 856, at 338. (Footnote omitted.)
148. Ibid.

be believed, the entire confession must be deemed trustworthy; and (3) those courts that admit only that part of the confession relevant to the corroborating facts.[149]

The taproot of the common-law rule under which facts discovered by means of an inadmissible confession are themselves competent evidence of guilt was hit by the decision of the Supreme Court in *Rogers v. Richmond*,[150] where the Court held that a state legal standard for governing the admissibility of a confession which took into account its probable truth or falsity was not permissible under due process. The state case of *People v. Ditson*[151] illustrates the influence of this decision on the traditional rule.

Ditson involved the bloody killing of a gangster named Ward, and the dismemberment and concealment of his body. The leader and the first lieutenant of the gang to which he belonged, Allen Ditson and Carlos Cisneros, were tried and convicted of the murder and sentenced to death. Ditson had ordered Ward's execution because the latter had tried to blackmail him and was suspected of being a potential "squealer." On the night of the crime, Cisneros hit Ward over the head with repeated blows of a hammer, stuffed him still alive into the trunk of his automobile, picked up Ditson and drove out to the country where Ditson shot Ward to death. To prevent identification, Cisneros dismembered Ward's body and buried the torso in a grave, retaining the head and arms which were later buried in other places.

Following his arrest, Cisneros made a confession which led to the finding of the victim's torso by the police. At the trial the judge ruled that the confession made by Cisneros was involuntary and excluded it from evidence. However, he admitted into evidence the testimony of the police as to the finding of the torso and the photographs taken at the grave, declaring: " 'the mere exclusion of the confession to my mind does not exclude the evidence secured by the People as a result of it.' "[152]

Apart from the evidence related to the confession, the proof of the defendants' guilt was overwhelming, and they were convicted. They appealed contending that they were denied a fair trial and due process of law by reason of the admission of evidence assertedly discovered by the police as a result of Cisneros' confession. The supreme court of California concluded, on detailed analysis of the various problems presented in the case, that the trial judge's ruling was immaterial, that the record revealed

149. 2 Wharton, Criminal Evidence § 357, at 58-60 (12th ed. 1955). (Footnotes ommited.)

150. 365 U.S. 534 (1961).

151. 57 Cal. 2d 415, 369 P.2d 714, 20 Cal. Rptr. 165 (1962), cert. granted 371 U.S 541 (per curiam), vacated as moot, 372 U.S. 933 (1963).

152. Id. at 422, 369 P.2d at 716, 20 Cal. Rptr. at 167.

no prejudicial error, and that the judgments of conviction should be affirmed.

In its consideration of the question of the admissibility of evidence discovered as the result of an involuntary confession, the court said that the above-quoted declaration of the trial judge portrays a view of the law that was once widely accepted, but which in recent years had been "rejected" by the Supreme Court of the United States and is now untenable.[153] The court noted that early California cases had followed the older doctrine allowing such evidence in, but that the rule now established under federal decisions has been recognized as that governing in California, even though it had perhaps not theretofore been unqualifiedly adopted.

The court explained that the doctrine admitting evidence of physical facts discovered by means of an involuntary confession was a corollary to the rule excluding involuntary confessions because of their presumed untrustworthiness, and that such evidence was uniformly held to be admissible since it tended to prove the trustworthiness of the confession. The court declared, however, that in recent decades the views of the courts on the nature and scope of the constitutional guarantee of due process had evolved a concept that bears directly on this problem—the rationale that due process is denied whenever a confession is used which has been obtained by means which the law should not sanction.

After a review of this development, the court stated that more recently in *Rogers v. Richmond*, the Supreme Court had declared that the traditional "trustworthiness" test of admissibility is not a permissible standard under due process, and that in this respect the *Rogers* decision may be viewed as unanimous for while the dissenting Justices disagreed with the procedural disposition of the case, they did agree that the Connecticut courts had failed to verbalize properly the correct due process test of admissibility by considering in their determination the impermissible factor of probable reliability.[154]

The California high court said that a development parallel to that in the state coerced confession cases decided by the Supreme Court under due process had taken place in its own decisions, and that it is now settled that involuntary confessions are excluded not because of their lack of evidential trustworthiness but because of the manner in which they are obtained. The court said that this conclusion is impelled by the due process clause of the California constitution as well as by the fourteenth amendment. The court stated that while it may have continued to make

153. Id. at 436, 369 P.2d at 725, 20 Cal. Rptr. at 176.
154. Id. at 438, 369 P.2d at 726, 20 Cal. Rptr. at 177.

occasional reference to the "trustworthiness" rationale, which it noted is surely a factor of importance by any standard, involuntary confessions will in proper circumstances be excluded by it because it offends the community's sense of fair play and decency to convict a defendant by evidence extorted from him, and because exclusion serves to discourage the use of physical brutality and other undue pressures in questioning those suspected of crime.

The court declared that "if it offends 'the community's sense of fair play and decency' to convict a defendant by evidence extorted from him in the form of an involuntary confession, that sense of fair play and decency is no less offended when a defendant is convicted by real evidence which the police have discovered *essentially by virtue of having extorted such a confession,*"[155] and that a constitutionally valid distinction cannot be drawn between the two. The court then said:

> It follows also that the reason for the common-law rule permitting the introduction of *real evidence* discovered by means of an involuntary confession—that such evidence tends to prove the "trustworthiness" of the confession—must now be deemed constitutionally indefensible, and hence that the rule itself must be abandoned.[156]

The opinion in the *Ditson* case was based upon due process considerations and was handed down prior to the ruling in *Malloy v. Hogan.* It is noted, however, that the constitutional privilege against self-incrimination, now the specific controlling principle governing the admissibility of confessions, has long been held to protect a witness " 'from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained or made effectual for his conviction . . . .' "[157] Furthermore, in regard to the new standards of admissibility based on the privilege announced in *Miranda,* Mr. Justice Clark has stated: "The Court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof."[158]

5. Confessions Induced By Subterfuge

Another rule on confessions at the common law which turns on the traditional rationale of "trustworthiness" is that concerning their induce-

155. Id. at 439, 369 P.2d at 727, 20 Cal. Rptr. at 178.

156. Ibid.

157. Counselman v. Hitchcock, 142 U.S. 547, 585 (1892), citing Emery's Case, 107 Mass. 172, 182 (1871).

158. Miranda v. Arizona, 384 U.S. 436, 500 (1966) (Clark, J., dissenting). See also United States v. Haynes, 9 U.S.C.M.A. 792 (1958) (fruits of illegally obtained confessions inadmissable under military law).

ment by the use of subterfuge. Greenleaf set out the common-law doctrine governing the admissibility of a confession obtained in such a manner as follows:

> It will be received, though it were induced . . . by any deception practiced on the prisoner, or false representation made to him for that purpose, provided there is no reason to suppose that the inducement held out was calculated to produce any untrue confession, which is the main point to be considered. . . . In all these cases the evidence may be laid before the jury, however little it may weigh, under the circumstances, and however reprehensible may be the mode in which, in some of them, it was obtained.[159]

Thus, traditionally, in a case where a subterfuge in the form of artifice, deception, trickery or deceit, not calculated to prompt the victim to confess falsely, was employed, and the subterfuge was not linked with any violence, threats, or promises of benefit, the courts generally ruled that the resultant confession was admissible, its admissibility being justified on the principle of evidential reliability. The courts, despite their distaste and disapprobation of such methods on the part of law enforcement officers, held the confession was voluntary because a subterfuge is not likely, in and of itself, to produce an untrue confession of guilt.

Under due process, however, a confession is inadmissible on constitutional grounds if in the circumstances of a particular case the subterfuge practiced upon a defendant is of such a nature that it is deemed to amount to mental coercion. Thus, the Supreme Court excluded a confession obtained where a police officer, who was a friend of the defendant, falsely told the defendant that he might be fired and his sick wife and children deprived if he did not confess and repeatedly appealed to him to do so. The Court ruled that the defendant's will "was overborne by official pressure, fatigue and sympathy falsely aroused."[160] Furthermore, in regard to the due process concept the Supreme Court made the following significant statement in a dictum in *Lisenba v. California*: If, by fraud, collusion, trickery, and subornation of perjury, on the part of those representing the State, the trial of an accused person results in his conviction, he has been denied due process of law. The case can stand no better if, by the same devices, a confession is procured, and used in the trial.[161]

As to the status of this doctrine under the *Miranda* standards based on the privilege against self-incrimination, the Supreme Court in discuss-

159. 1 Greenleaf, Evidence § 220b. at 359-60 (16th ed. 1899). (Footnotes omitted.)

160. Spano v. New York, 360 U.S. 315 (1959).

161. 314 U.S. 219, 237 (1941).

ing the procedural safeguard of a valid waiver of rights as an absolute prerequisite to in-custody interrogation declared: "Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege."[162]

III. Conclusion

This passing look at a few of the milestones marking the law's route indicates that the task of American law enforcement in successfully carrying out its principal mission of maintaining law and order is one of increasing difficulty. The difficulty is due in part to the growing demands of the law in the form of stricter rules of procedure and higher standards of performance for law enforcement brought about by the emphasis placed upon the importance to our way of life of specific individual rights which are guaranteed by the supreme law to all alike—the guilty as well as the innocent. Manifestly, these procedures and these standards aimed at the protection of these constitutional rights in the early stages of the criminal prosecution must be fully honored. Thus, a challenge of great magnitude is directed to law enforcement which puts it on its mettle as a profession and summons all its members to meet it in the manner of professional men. Only the briefest consideration suffices to show how these developments in the law have made the role of the law enforcement officer more important, decisive and exacting than it has ever been in the past.

In the performance of his duty, the American law enforcement officer is the law in action, its shield and its sword. At one and the same time, he is the guarding hand of government to ensure that the right of the law-abiding public to live in peace is protected; and he is the sturdy arm of government to ensure that the criminal law is enforced against those relatively few who willfully refuse to obey the elementary rules of community life and ruthlessly deny to the many their just claim to security from crime's threat and actuality. This criminal law which he enforces is the roughest instrument of society but, paradoxically enough, it is an instrument which must be most delicately employed. It has to be enforced with strength or its purpose will be nullified; it must be enforced with care or it will breach basic principles of liberty and justice. Since the officer is the agent of government who must face this dilemma at the outset, his decisions and his actions frequently determine whether the problems raised by it will be solved.

In order to discharge his responsibility of preserving the public peace,

162. Miranda v. Arizona, 384 U.S. 436, 476 (1966).

it is imperative that the officer detect crime and those responsible for it by the discovery of proof of guilt. This serious obligation to establish the fact of crime, to identify the person who has committed it, and to apprehend him so that he may be brought before the bar of justice, is imposed by the solemn command of the law. Among the means by which this obligation is met are the police actions of arrest, search, seizure, and interrogation. These actions involve one or more cherished constitutional rights of the individual such as the right to personal liberty, the right to privacy, the privilege against self-incrimination and the right to counsel and the serious obligation of ensuring that these drastic but necessary acts do not invade these rights is imposed by the same solemn command of the law.

The law enforcement officer, therefore, stands at the very forefront of the great conflict that exists between the interest of a free society in prompt and efficient enforcement, and its interest in preventing the rights of individual members from being abridged by unconstitutional methods of enforcement. It is essential that a true balance between these two interests be properly set and faithfully kept. The responsibility of setting the delicate balance is the grave obligation of those who must make and interpret the law, and the immediate task of maintaining it is that of those who must enforce the law in the streets and alleys of the nation. Needless to say, the problems involved in the proper setting of the balance between these competing social interests are so many and perplexing that able men may reasonably differ as to how they are to be reconciled.

Once the crucial decision has been made, however, and the law is handed down, the course of the law enforcement officer is clear. He must follow the law and the rules by which it is to be enforced to the limit of his ability and in the best of faith. The fact that a particular rule of law may or may not be to his own preference, or the fact that it may or may not be difficult to apply are accidentals that have nothing to do with the law's command and the duty to obey. Inasmuch as expansion of the area of individual rights leads to a narrowing of the area of permissible police action, the law enforcement officer must exert greater effort than he has ever made in the past if he is to successfully meet his added responsibilities. There is no other way to maintain the balance set by the law.

Failure on his part to satisfy the more stringent rules of the law and to tailor his actions to the higher standards required may do grave harm to the cause of justice. Although his efforts in the investigation of crime may have led to the uncovering of evidence which demonstrates the de-

fendant's guilt beyond question, a mistake may render the evidence inadmissible and ultimately enable a criminal to go free. If this happens, not only does his hard work go for naught, but, more importantly, the spectacle of an escape from justice by an obviously guilty felon—murderer, rapist, robber or what you will—seriously weakens the sanction of sure and swift punishment whose great justification lies not in retribution or atonement of crime, but in deterrence, protection and reformation. When such a travesty occurs, no lesson is taught the criminal, no preventive example is forthcoming to deter those of like bent, and the community is exposed once more to the danger of repeated attack from an unreformed criminal at large.

It is not sufficient that the law enforcement officer of today be right in most of the steps he takes; he must do his utmost not to fail or falter in any one of them. If, at the outset, he ascertains a fact in an impermissible manner, the additional evidence to which it leads in the direct course of investigation is spoiled by his initial mistake—the "fruit of the poisonous tree." The entire superstructure of the case built upon an unlawful base collapses like the image whose feet were "part of iron and part of clay." Furthermore, if he gathers a plenitude of extrinsic evidence to prove the defendant's guilt, but in the final phase of the case obtains a constitutionally invalid confession which is admitted in evidence against the accused, the entire proceedings will be vitiated and any conviction secured will not be allowed to stand. If his error was made in good faith, the tainted evidence is still beyond redemption. If in a rare event his error is willful, his unlawful act breeds disrespect for the law, and brings the law, the profession, the individual agency and the officer himself into disrepute.

There was a time when the able law enforcement officer could perform the difficult duties required of him in these fields with only a modicum of legal knowledge. He could return a commendable "yeoman's service" to the community based on the personal attributes he possessed, such as sharp senses, a busy imagination, good judgment, practical experience, a natural sense of justice and fair play, personal reserve and discipline, an alertness to the danger of the innocent being falsely accused of crime, and an ideal of public service that impelled him to do everything in his power to protect his fellow citizens from the evil of crime. The discovery of the truth in the case by means of logically relevant, reliable evidence was to all intents and purposes the main desideratum and he was fully capable of attaining it. But this is not enough today. The discovery of truth, of course, is the prime purpose of criminal investigation, just as it is the ultimate end of a criminal trial, but the manner in which

proof of guilt is gathered in a particular case may be a consideration of equally great importance. Where relevant evidence is obtained by methods which violate fundamental constitutional guaranties, it is inadmissible. It is inadmissible not because its efficacy in establishing the truth is questioned, but because it was obtained in a manner that is destructive of essential values which the law will protect even at the cost of the guilty going free.

It is necessary, therefore, in the interests of the common good, that the law enforcement officer of today be fully cognizant of the increasing number of rules which the law has laid down to guarantee the exercise of those rights held to lie at the base of American liberty and justice and to protect them from restraints deemed to be beyond the needs of society and the necessary demands of the effective enforcement of its laws. Furthermore, he must be skilled in the application of these rules, all of them strict and many of them technical, for they frequently must be applied under great pressures in those fast-moving, unprecedented situations that are a commonplace of everyday law enforcement life. On such occasions time is of the essence and there is little opportunity for long reflection and none for consultation. If he does not act then and there, it may be impossible to vindicate the law. Without this knowledge and skill he is incapable of doing his duty in the way he desires, or in the way the community has the right to expect.

It follows that as the requirements of the law have become more difficult to meet and its standards for police performance have grown higher, so has the need increased for education in legal matters of law enforcement personnel. Law enforcement as an institution has sought to meet this need through the means of police training which in the past few decades has been one of the most effective forces in its drive to professional status. It is a professional imperative that this phase of police training be extended in furtherance of the interests of justice. Due to the dynamic nature of the subject matter, the instruction must be of a continuing nature throughout the officer's entire career, and a prominent feature of in-service as well as recruit police-training schools.

This essential training in the law must not be limited to the presentation and study of the bare rules themselves. The course of instruction must press beyond the language of the rules to encompass the policies, purposes, and history of the doctrines upon which they are based. This is particularly true in regard to those rules not designed to facilitate the ascertainment of facts by guarding against evidence which is unreliable, prejudicial or misleading, but to protect other social interests. Since rules which bar logically relevant evidence whose exclusion may allow "some

offenders to go unwhipped of justice" must be justified by over-riding policies expressed in the Constitution or the laws, knowledge of these policies is necessary to enable the officer to put the rules in their proper light. They will then appreciate them for what they are, rather than be inclined to regard them as technical barriers to the discovery and proof of the true facts in a case. Knowledge of the purposes underlying the rules will highlight the necessity for the methods of procedure required, and improve their mode of application in the variety of situations confronting the officer in his daily work. Knowledge of the history of the doctrines underlying the rules will enable the officer to understand why they occupy such a lofty place in our jurisprudence and why they must be protected against unlawful infringement.

In the field of interrogation, for example, when the officer is cognizant of the background of the privilege against self-incrimination and the interests it is designed to protect, he will more readily understand the rules governing the admissibility of a confession. When he realizes that the privilege is deemed to be not "an adjunct to the ascertainment of truth," but a doctrine whose basic purposes relate to the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution "shoulders the entire load," he will understand why a prisoner has the absolute right to remain completely mute if he so wills, and why this right must be honored. He can better understand why the law considers confessions to be a proper element in law enforcement, but nevertheless demands that certain safeguards be respected before a person in custody may be questioned. By the same token, he can better appreciate why our adversary system of prosecution prefers investigation to interrogation, and raises to the modern professional officer the ideal that crimes are to be solved by thorough, skillful investigation which extends beyond the words of the defendant and which results in the gathering of independent, extrinsic evidence of guilt.

Finally, this essential instruction of law enforcement personnel in legal matters is invaluable to the individual officer in a very personal sense. By reason of his daily work the officer has an appreciation of the evil effects of crime that no person in the community can match other than the victim of the crime himself. As a result he is imbued with a natural human zeal to do his utmost to discover and apprehend those who have caused the prohibited harm. Knowledge of constitutional limitations, however, will help him temper his commendable zeal with caution and cause him to prudently delay that action which the law deems precipitate. It will give him, on the other hand, that confidence which he needs to act swiftly and decisively in those situations where law and duty com-

mand that such be done. It will enable him to lay the ghost that haunts all conscientious law enforcement officers of today—the fear that acting in good faith he may nevertheless err and "confer immunity upon an offender for crimes the most flagitious."